INDICTMENT CHARGING PETITIONER WITH EMBEZZLEMENT.

Indictment charging petitioner with embezzlement and/or conversion under the Kentucky Revised Statutes 434.020 and 434.220(1) returned by the Carter County, Kentucky Grand Jury March 23, 1965, is set forth in the Appendix to this Petition at pages 28-30.

INSTRUCTIONS REQUESTED BY PETITIONER.

Instructions requested by petitioner in the District Court, Nos. 17, 19-22 inclusive, and refused by the District Court, are set forth in the Appendix to this Petition at pages 31-34.

STATEMENT.

Petitioner was the Superintendent of the Carter County, Kentucky School District from 1938 to 1962. In 1962 he was indicted by the Federal Grand Jury at Louisville, Kentucky for willful evasion of income taxes pursuant to Section 7201, Internal Revenue Code of 1954; 26 U.S.C. Section 7201. The indictment charged him with the attempt to willfully and knowingly evade taxes due and owing by him and his wife to the United States for the years 1955 and 1956. The indictment charged that for the year 1955 he reported $1,769.62 as income and paid $369.31 income tax when he should have reported $23,851.95 income and paid $6,759.13 income tax and for the year 1956 that he reported $5,644.00 as income and paid $1,182.49 income tax when he should have reported $9,584.75 and paid

$2,112.85 tax. Upon petitioner's plea of not guilty to both counts of the indictment, a trial by jury was held at Lexington, Kentucky which resulted in his conviction on both counts of the indictment. An appeal to the Court of Appeals for the Sixth Circuit resulted in an affirmance and this petitioner seeks a Writ of Certiorari to review that decision.

It was the theory of the United States in the Court of Appeals that petitioner obtained the money which belonged to the School District through "fraud and deceit." Petitioner denied that he received any such funds, but contended that if it be assumed that he did obtain such funds and money, then his obtention of the same under the circumstances shown by this case constitute embezzlement for which he cannot be convicted under the holding in the cases of Wilcox and James. On July 24, 1963 the Court of Appeals for the Fifth Circuit decided the case of Adame v. C. I. R., 320 F. 2d 811, upon facts which petitioner contends are so similar to those in his case that there is presently a conflict between the decision of the Court of Appeals for the Sixth Circuit and the decision of the Court of Appeals for the Fifth Circuit in the Adame case.

As stated by the Court of Appeals for the Sixth Circuit in its opinion, it was claimed by the United States that Carpenter Body Works issued to petitioner certain checks intended to represent refunds to the Carter County School District on bus bodies not delivered; that instead of depositing said checks to the credit of the Carter County School District the peti-

tioner cashed the checks and converted the proceeds thereof to his own use.

The United States also contended that a certain check was issued to one Whitehurst for over $20,234.63; that this check ostensibly was in payment for what was due Whitehurst under a contract with the Board of Education; that the amount of the check exceeded the amount actually due Whitehurst by $6,178.60; that Whitehurst delivered the excess of the check to petitioner and that petitioner converted it to his own use.

The United States also claimed that false claims were presented to the Board of Education by Stevens Motor Sales for school buses allegedly delivered to the Board; that such buses were not in fact delivered and that petitioner received and converted to his own use the amount of such payments; that various materials such as those supplied by a company known as Minter Homes were supplied and paid for by the Board of Education and that petitioner converted them to his use.

It was contended by the Government in the Court of Appeals for the Sixth Circuit that all of the alleged transactions above recited were brought about by the fraud and deceit practiced by the petitioner upon the Board of Education.

As above stated, petitioner denied all of these transactions and further contended that if such transactions took place they constituted embezzlement and the funds claimed to have been realized by him therefrom were not taxable during the years 1955 and 1956 when the rule of Wilcox was in effect.

In the District Court the petitioner requested in writing that the jury be instructed that petitioner could not be convicted for failing to report any alleged items of income which would constitute embezzled funds. The instructions offered by petitioner, Nos. 17, 19-22 inclusive, appear at pages 31-34 of the Appendix to this Petition. These instructions were refused by the District Court and the Court of Appeals for the Sixth Circuit has held that petitioner was not entitled to such instructions because, as a matter of law, no item of the alleged income constituted embezzled funds.

There was a total of eleven items of alleged income not reported for the years 1955 and 1956 and it cannot be determined from the jury's verdict which of said items the jury believed the petitioner received.

REASONS FOR GRANTING THE WRIT.

Petitioner says this Petition for Writ of Certiorari should be granted because:

1. The decision below is adverse to the petitioner on the issue of whether or not in prosecution for alleged income tax evasion, petitioner can stand convicted of willfully failing to report as income during the years 1955 and 1956 funds and money that petitioner contends, if received, constitute embezzled funds under the laws of the State of Kentucky and within the holding of the cases of Commissioner of Internal Revenue v. Wilcox, 327 U. S. 404, 90 L. Ed. 752, and James v. United States, 366 U. S. 213, 6 L. Ed. 2d 246.

2. The decision of the Court of Appeals is in conflict with the decisions of this Court in Commissioner

of Internal Revenue v. Wilcox, 327 U. S. 404, 90 L. Ed. 752, and James v. United States, 366 U. S. 213, 6 L. Ed. 2d 246.

3. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Fifth Circuit in Adame's Estate v. Commissioner of Internal Revenue, 320 F. 2d 811.

4. The decision of the Court of Appeals is in conflict with Kentucky Revised Statute 434.020 and the decisions of the Court of Appeals of Kentucky construing the same in which the crime of embezzlement has been fully defined by the statute and Kentucky decisions.

5. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Tenth Circuit in the case of Beck v. U. S., 298 F. 2d 622.

On account of the conflict and variation of views expressed by the appellate courts, the misapplication of the rule of Wilcox as it existed during this period, and the James case, it is urged that in the public interest and the interest of this petitioner that these issues should be resolved by a decision of this Court. These points will be discussed and amplified in the following argument.

ARGUMENT.

All of the reasons above numbered and stated revolve around one single question of whether the petitioner in coming into possession of any one of the several eleven items and converting same to his use, committed embezzlement. In Beck v. U. S., 298 F. 2d

622, it was held that where it could not be determined from the verdict which item of income the jury believed the defendant received, he was clearly entitled to an instruction on the question of embezzlement and denial of his request for such instruction by the District Court constituted reversible error.

This must be true unless no one of the items allegedly received by petitioner constituted embezzlement of funds. It cannot be ascertained from the verdict which of these items alleged to have been received by this petitioner were believed by the jury in fact to have been received by him. Therefore, if any of the items allegedly received by him constituted embezzled funds then this verdict would have to be set aside.

On an occasion during each year, 1955 and 1956, petitioner is charged to have received a check from Carpenter Body Works for bus body refunds due the Carter County School District for bus bodies ordered but not delivered. These checks were made payable to petitioner as "H. H. McGuire Transportation Department" and "H. H. McGuire Transportation Fund." He is alleged by the Government to have received each of these checks from Carpenter Body Works in Mitchell, Indiana. He is alleged to have brought these checks to Grayson, Kentucky, cashed them at the local First National Bank and instead of depositing the amounts of said checks to the account of the Board of Education, converted the same to his own use.

KRS 160.370 (Appendix to this petition, page 25) made petitioner, as superintendent, the "executive agent of the Board," or "executive officer of the

Board." It gave to him "general supervision" of the schools and vested in him general conduct of the "management of business affairs" of the district. KRS 160.390 (Appendix to this petition, pages 25-26) provided that petitioner should "exercise general supervision" of the schools of his district.

Undoubtedly when Carpenter Body Works delivered these checks to petitioner describing him as "H. H. McGuire, Transportation Department," and "H. H. McGuire, Transportation Fund" they entrusted him with a refund for payments made for bus bodies not delivered, and under the statutes above cited, he had not only the authority but the duty to receive those checks on behalf of his school district. Therefore, we have here a case where the chief officer of the School Board was entrusted by Carpenter Body Works, a debtor of the Carter County School District, of which petitioner was the superintendent, being entrusted with refunds due the district for undelivered bus bodies. KRS 434.020, under which this petitioner now stands indicted in the Carter Circuit Court at this time for embezzlement is the embezzlement statute in Kentucky. The pertinent provisions of this statute, KRS 434.020, are set forth in the Appendix to this petition, pages 26-27.

At common law there was no such crime as embezzlement and the foregoing is the embezzlement statute in Kentucky. Since these acts are charged to have taken place in Kentucky, the quality of petitioner's acts must be determined by the law of Kentucky although it is true that the law of Kentucky cannot con-

trol the matters of federal taxation which are left to Congress.

But aside from statutory considerations, we submit that petitioner, as superintendent of the Carter County School District, had as much authority, right and duty to receive from Carpenter Body Works the checks for the bus body refunds as did bookkeeper Wilcox to receive any moneys for his company and if petitioner converted the proceeds of these checks to his own use he was violating a trust owed to his employer, namely, Carter County Board of Education, the same as Wilcox was violating the trust owed to his employer.

It is therefore contended by petitioner that the decision of the Court of Appeals for the Sixth Circuit is in error and in conflict with the decision of this Court in Wilcox. In the James case, which overruled Wilcox and ordered the indictment against him dismissed, it was held that "the element of willfullness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed." Therefore, the opinion of the Court of Appeals for the Sixth Circuit was in conflict with both Wilcox and James.

The item of income charged to petitioner similar to those of Adame is the item allegedly received by petitioner from Whitehurst during the year 1955. In the Adame case the Court of Appeals for the Fifth Circuit held that a superintendent of schools had committed embezzlement and therefore could not have willfully

failed to report income on account thereof. The facts were that Adame obtained checks from the school district and made them payable to a hardware store for amounts in excess of what the school district actually owed. The hardware store knowingly accepted the checks for the excessive amounts and gave back to Adame the amounts by which the amount of the checks exceeded the school district's true account. In this case petitioner is charged with delivering to Whitehurst a check for the amount of $20,234.63 purporting to cover the school district's account with him. Whitehurst is alleged to have paid over to petitioner the amount of money, namely, $6,178.60 in cash, by which the amount of the check exceeded the amount actually owed Whitehurst. However, the Court of Appeals for the Sixth Circuit held that these funds were not embezzled and that Adame was "inapposite." Petitioner contends that the facts of this case are the same, in principle, as those presented by Adame and that the decision of the Court of Appeals for the Sixth Circuit is in direct conflict with the holding of the Court of Appeals for the Fifth Circuit.

Chapter 434 of the Kentucky Revised Statutes covers the crime of embezzlement and the decisions of the Kentucky Court of Appeals fully define "embezzlement" as condemned by that Chapter. Sergent v. Commonwealth, 257 Ky. 567, 78 S. W. 2d 795; Commonwealth v. Bain, 42 S. W. 2d 8 and Commonwealth v. Bain, 240 Ky. 752, 43 S. W. 2d 11. As above stated, the petitioner now stands indicted in the Carter Circuit Court under this Chapter of the Kentucky Revised

Statutes and specifically under KRS 434.020 and 434.220(1) for the crime of "embezzlement" alleged to have arisen out of the same transactions involved in this proceeding. As held in the cases of Bain by the Kentucky Court of Appeals, petitioner cannot rely upon any lack of legal authority to receive the items charged to him. He cannot say that only the treasurer should have been the recipient of the Carpenter checks. When the checks or money came into his hands and especially when Carpenter Body Works delivered to him the checks made payable to "H. H. McGuire, Transportation Fund" and "H. H. McGuire, Transportation Department" these checks were undoubtedly turned over to him for delivery of their proceeds to the Board of Education of Carter County and it thereupon became his duty under his trust to turn the aforesaid proceeds over to his employer. If he received the proceeds of those checks and converted the same to his own use, as contended by the Government, it is obvious that he thereby committed the crime of embezzlement; that the funds were embezzled funds and were not taxable during the years 1955 and 1956. Petitioner therefore contends that the decision of the Court of Appeals for the Sixth Circuit in this case is in erroneous conflict with the Statutes of Kentucky and the decisions of the Kentucky Court of Appeals defining embezzlement.

In Beck v. U. S., 298 F. 2d 622, it was decided by the Court of Appeals for the Tenth Circuit that the judgment of conviction would have to be set aside because it could not be determined whether or not the

jury found Beck guilty of having received funds which were unmistakably embezzled. The same situation prevails in this case. Under the instructions given by the Court it is possible that the jury could have returned a verdict of guilty on each count of the indictment under the belief that petitioner had received the 1955 and 1956 Carpenter Body Works' checks which undeniably constituted embezzled funds if he received them under the circumstances charged by the Government. The jury could have believed that these were the only funds he received. They could have believed that he received the 1965 Carpenter check and the payment of $6,178.60 from Whitehurst Company in 1955 which also undeniably constituted embezzled funds. In short, this verdict could have been bottomed entirely by the jury upon items which were held in Wilcox and Adame to have embezzled funds. Petitioner requested instructions pointing out that he could not be deemed to have willfully evaded income taxes during those years when such items did not constitute taxable income. Instructions offered by Petitioner, Nos. 17, 19-22 inclusive, pages 31-34, Appendix to this petition. These instruction were refused and the Court of Appeals for the Sixth Circuit held that they were rightfully refused by the District Court upon the ground that none of the items charged to petitioner constituted embezzled funds. Petitioner therefore contends that the decision of the Court of Appeals for the Sixth Circuit is in conflict with the decision of the Court of Appeals for the Tenth Circuit in Beck.

It is a significant paradox that petitioner, Heman H. McGuire, now stands indicted for embezzlement by the Carter County, Kentucky Grand Jury, and if he is convicted therefor and the conviction in this case for willful evasion of income taxes is sustained, he will undoubtedly be required to serve a sentence in the Federal penitentiary for not having embezzled any of the funds in the instant case, and thereafter serve a sentence in the Kentucky penitentiary for having embezzled the same identical funds.

CONCLUSION.

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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